No. 83-1178

In the Supreme Court of the United States

October Term, 1983

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD.; and E.C. McAFEE COMPANY,
Petitioners,

vs.

UNITED STATES OF AMERICA; THE SECRETARY OF THE TREASURY; UNITED STATES CUSTOMS SERVICE; THE COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE; THE ASSISTANT COMMISSIONER OF CUSTOMS (COMMERCIAL OPERATIONS), UNITED STATES CUSTOMS SERVICE; DIRECTOR, OFFICE OF REGULATIONS AND RULINGS, UNITED STATES CUSTOMS SERVICE: and DISTRICT DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DETROIT, MICHIGAN;
Jointly and Severally,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Court of International Trade, having made specific findings that:

a. an importer is suffering irreparable harm threatening his very existence as a business; and

b. the harm is directly caused by the failure of the Customs Service to afford procedural due process of law;

has jurisdiction under 28 U.S.C. § 1581(h) and (i) to afford a remedy to that importer.

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The petitioners, AMERICAN AIR PARCEL FORWARDING COMPANY, LTD. and E.C. McAFEE COMPANY, by their attorneys, GOODMAN, MILLER & MILLER, P.C., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on October 14, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Federal Circuit, not yet reported, appears in the Appendix hereto, together with the two relevant opinions of the Court of International Trade.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on October 14, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28

§ 1581(h).

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

§ 1581(i).

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

§ 2637(c).

A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade prior to the exhaustion of administrative remedies if the person commencing the action makes the demonstration required by such section.

§ 2637(d).

In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.

STATEMENT OF THE CASE

The jurisdiction of the Court of International Trade was invoked under 28 U.S.C. § 1581(h) and (i) to enforce a ruling issued by the Secretary of the Treasury providing for duties on the importation of merchandise. After granting a preliminary injunction on August 31, 1982, the case was dismissed for lack of jurisdiction in January of 1982. An appeal as of right was taken to the United States Court of Appeals for the Federal Circuit which, on October 14, 1983, affirmed the decision below.

The petitioner in this case is AMERICAN AIR PARCEL FORWARDING COMPANY, LTD. (AAP). AAP was plaintiff in the trial court. AAP imports merchandise into the United States. Inquiring as to whether the basis of duty calculation would change after the July 1, 1980 effective date of the Trade Agreements Act of 1979 (P. L. 96-39), and how goods being imported already should be valued, AAP sought and achieved a "ruling" from the Customs Service confirming the basis of duty on the subject merchandise as to both current and prospective transactions. Relying on that ruling, AAP proceeded to import. Without notice, the Customs Service revoked the ruling contrary to statute and its own regulations. The trial court found that this action caused irreparable harm to AAP and issued a preliminary injunction. The Customs Service then brought to the trial court an opinion of the Court of Appeals for the Federal Circuit, and based upon the precedent of this newly announced holding, the trial court dissolved its injunction, stating, in effect, that it no longer had jurisdiction over the case. AAP appealed to the Court of Appeals for the Federal Circuit and the trial court's dissolution of the injunction was affirmed. The following

facts are uncontroverted, and represent stipulations by the Customs Service:

1. The merchandise which is the subject of this action is various items of wearing apparel.

2. On or about January 16, 1980, following discussions with plaintiff AMERICAN AIR PARCEL FORWARDING COMPANY, LTD. (hereinafter known as AAP) regarding the valuation of the merchandise AAP imported from Hong Kong, the District Director of Customs, Detroit, Michigan, requested internal advice of Customs Service Headquarters pursuant to 19 C.F.R. § 177.11 regarding the appraisement of AAP's merchandise.

3. On October 17, 1980, in response to the aforesaid request for internal advice, the Director, Classification and Value, Headquarters issued a ruling identified as follows: CLA-2 RRUCA 065056CM TAA #10 (hereinafter referred to as "TAA #10"). TAA #10 is also known as IA 25/80.)

4. On March 11, 1981, the Customs Service published TAA #10 in the *Customs Bulletin* (15 Cust. Bull. & Dec., No. 10). TAA #10 was identified as C.S.D. 81-72 at the time of its publication.

5. Subsequent to the issuance of TAA #10, the Director, Classification and Value in San Francisco requested reconsideration of TAA #10 as it related to appraisement of merchandise on the basis of transaction value under Section 402(b), Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 and the Director, Classification and Value in Detroit submitted a memorandum to Customs Service Headquarters in Washington, D.C., in support thereof.

6. On July 23, 1981, Customs Service Headquarters in a ruling referred to as CLA-2:RRUCV, 542406 BLS, affirmed TAA #10.

7. On September 9, 1981, Customs Service issued a telex directed to, *inter alia*, District Directors, San Francisco and Detroit, pertaining to TAA #10.

8. Neither plaintiffs nor the importing public were given prior notice of the telex dated September 9, 1981.

9. On October 19, 1981, Customs issued a ruling referred to as: CLA-2-CO:R:CV:V,542643 TLL, TAA #40 (hereinafter referred to as TAA #40).

10. TAA #40 revoked TAA #10.

11. TAA #40 revoked TAA #10 retroactively, citing section 177.9(d) of the Customs Regulations (19 C.F.R. § 177.9(d)) as authority for that action.

12. TAA #40 was never published in the *Customs Bulletin, Federal Register,* or in any other publication which would give the general or importing public notice of its contents.

13. The defendants did not seek comments of the plaintiffs or the general public prior to the issuance of TAA #40.

14. Defendants did not publish a notice in the *Federal Register* or the *Customs Bulletin* that TAA #10 was under review.

15. Subsequent to the revocation of TAA #10, many entries made by the plaintiffs were liquidated at values two (2) to three (3) times as great as the entered value, thereby causing bills for increased duties to be issued in the amounts in excess of approximately $20,000 and $30,000 per entry [making a total in excess of $9,300,000].

No information relating to the reasons for issuance of the telex or the reasoning for revocation of TAA #10

has ever been furnished by the Customs Service. The trial court confirmed the mystery of the revocation of TAA #10 stating, "the revocation of C.S.D. 81-72 (TAA #10) is not explained by defendant."

The fact that Judge Landis concluded that a revocation of a ruling was made on the basis of factors "unbeknown" to the court is the basis of this case, and the reason that the Court of International Trade must have jurisdiction over this case.

The trial court (Court of International Trade), in its Memorandum and Order on Plaintiffs' Motion for a Preliminary Injunction, made a finding of irreparable harm; and, finding of a likelihood of success on the merits.

Citing from the opinion of Judge Landis in the Court of International Trade, the trial court in the instant case, it must be noted that:

> As a ruling TAA #10 established a uniform practice under 19 CFR § 177.10(b). Since the unpublished telex ruling in issue abrogated TAA #10 and imposed a higher rate of duty or charge on the merchandise in question, the telex ruling must find that TAA #10 was clearly wrong. 19 CFR § 177.10(b). However, there is no indication that this ruling found TAA #10 to be clearly wrong. Further, before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review must be published in the Federal Register and interested parties must be given the opportunity to make written submission as to the correctness of the contemplated change. 19 CFR § 177.10(c). The court has not been able to uncover the required publication

in the Federal Register nor had defendant come forward with such evidence. Appendix, p. A8.

Although later stipulations by the government admit the wholesale failure of the Customs Service to follow the procedure mandated by regulation and imposed by statute, the significance of this procedural massacre is enforced by Judge Landis. Does the Supreme Court intend that an opinion of the Court of Appeals for the Federal Circuit authorizing such departures from procedural requirement serve as the law of the land? If so, does the Constitution not require an elaboration by the Supreme Court as to the reasons that the Customs Service is above the Constitution?

REASONS FOR GRANTING THE WRIT

More than 60 years of practice before the Supreme Court persuades me that this is an urgently demanding case. The rights violated are the most basic. The manner of their violation is most lawless. The complicity of Federal Courts in allowing arbitrary and capricious Customs action is most shocking.

Forty years have passed since the Supreme Court last reviewed a question of Customs Law. The Supreme Court has never had occasion to review the jurisdiction by the federal courts of Customs laws.

District Courts recognized the failures of the now reformed United States Customs Court and United States Court of Customs and Patent Appeals to afford relief to litigants whose rights of due process of law were abrogated. *Cottman Co. v. Daily*, 94 F.2d 85 (4th Cir. 1938); *Eastern States Petroleum Corporation v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), cert. denied, 364 U.S. 891 (1960);

Horton v. Humphrey, 146 F.Supp. 819 (D.C. 1956), *aff'd*, 352 U.S. 921 (1956); *Argosy Limited v. Hennigan*, 404 F.2d 14 (5th Cir. 1965); *SCM Corporation v. United States*, 549 F.2d 14 (D.C. Cir. 1977).

When repeated litigants were denied redress by the Customs Court and the Court of Customs and Patent Appeals, those litigants brought action in the District Courts. The District Courts found violations of due process and granted relief. Congress realized the need for a specialized court to deal with Customs considerations, as well as the requirement that such a court be endowed with the general equity jurisdiction of the district courts. The Court of International Trade (as successor to the Customs Court) and the Court of Appeals for the Federal Circuit (as successor to the Court of Customs and Patent Appeals) were established in 1980.

The establishment of new courts of expanded jurisdiction would finally check the barbaric violations of due process made by the Customs Service. Injunctions were granted and all of the importing community believed their day of full citizenship had arrived. If the Customs Service broke the law and caused irreparable injury, a federal court would grant relief. This was a rather usual function of the federal judiciary in other areas, but a major miracle to the importing community. Since the turn of the century, importers had seen the Customs Service regularly disregard regulations because no court could find jurisdiction to correct the abuse.

The Court of Appeals for the Federal Circuit handed down its opinion in *Uniroyal v. United States*, 687 F.2d 467 (F. Cir. 1982), on September 2, 1982. In reliance upon the opinion in *Uniroyal*, *id.*, the Court of International Trade vacated the previously granted injunction in the instant case. It did so reaffirming that AAP was

suffering irreparable harm at the hands of the Customs Service and without upsetting its holding of likelihood of success on the merits.

The entire importing community, having business interests affecting worldwide trade was cast back to the dark ages with a worse barrier. At this juncture, based on the expanded jurisdiction of the Court of International Trade, even access to the district courts was prevented in view of the exclusive subject matter jurisdiction of the Court of International Trade.

In a clear manner, the Court of Appeals for the Federal Circuit, in their affirming opinion below, illustrated to the Customs Service the way in which statutory safeguards and administrative regulations could be abandoned, injuries could be inflicted on importers with impunity, and lawless action could be condoned.

Nothing in the present political climate which seemingly disfavors imports can provide any justification for constitutional abuse by the Customs Service, and preservation of the abuse by the affirmation of the Court of Appeals for the Federal Circuit in the opinion below. When the founding fathers gave to congress the power to regulate imports, they did not envision and certainly did not provide for lawless regulation. This is precisely what the Court of Appeals for the Federal Circuit condones.

The government contends that the avenue of access to the Court that must be followed is:

(a) Merchandise arrives physically in the United States;

(b) An "entry" is filed with the Customs Service documenting the contents of the shipment and showing the amount of duty owing;

(c) The duty owing is paid;

(d) The Customs Service makes a determination of whether the correct duty has been paid and whether the merchandise is correctly classified, by "liquidating" the entry;

(e) The importer files a "protest" with the District Director in the area of the United States where the merchandise was entered, challenging the basis upon which the merchandise was "liquidated";

(f) The District Director denies the "protest";

(g) The importer must pay any additional amounts of duty, if any, required by the liquidation;

(h) The importer files a Summons and Complaint in the Court of International Trade.

AAP agrees that absent a finding of irreparable harm this scheme of challenge to the determinations of the Customs Service constitutes an adequate remedy. Recourse to the courts for challenge to actions of the Customs Service follows the general proposition of exhaustion of administrative remedies prior to judicial review. However, the framework of law requiring exhaustion of administrative remedies is conclusively founded upon the presumption that the administrative agency has acted in accordance with law and the applicable procedural safeguards in coming to its determinations. The Customs Service violated the law and acted outside the procedure required by law.

The decision below raises significant and recurring problems concerning when a litigant is required to exhaust administrative remedies as a prerequisite to judicial review. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court stated that, "*But cases may arise*

where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case. [emphasis added]" *Id.* at 330.

The opinion of the Court of Appeals for the Federal Circuit holds that the Congressional scheme of protest and review will cure all ills and constitutional violation. AAP posits the question of whether the Supreme Court will tolerate *intentional violations of procedural due process causing irreparable harm,* so long as protest and review might some day cure the problem.

The question of whether the Customs Service is an administrative agency of the United States whose procedures must be subservient to Constitutional guarantees, or whether this administrative agency is entitled to special concerns, must be resolved by the Supreme Court.

The statute governing the Customs Service, 19 U.S.C. § 1315(d), requires publication in the Federal Register prior to changing or revoking a ruling. A regulation governing the Customs Service, 19 C.F.R. § 177.10(c) requires publication in the Federal Register, as well as a hearing and other requirements before changing or revoking a ruling. The Customs Service broke both statute and regulation in this case. The actions of the Customs Service had the result of demanding significant sums of money from AAP, and in the words of the trial court, caused irreparable harm to AAP.

The Constitution of the United States assures that, "No person shall . . . be deprived of . . . property without due process of law." U.S. Const. amend. V.

The Supreme Court continues to state that, "[T]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a

property interest." *Wolff v. McDonell*, 418 U.S. 539, 557-558 (1974).

Thus the Supreme Court is called upon to show that Constitutional mandate, already enacted into statute, already enacted into regulation, but deliberately disregarded by an administrative agency with sanction by a Court, cannot be the law of the land. If this is to be the law, the Supreme Court is called upon to distinguish why the Customs Service is entitled to violate the Constitution and the unique features permitting the Constitution of the United States to be bent to the whims of political views in the area of foreign importation.

The Supreme Court, as mentioned, has never addressed in its jurisprudence this potentially unconstitutional scheme of protest and review of Customs Service decisions.

When there is a finding of irreparable harm, which the trial court characterizes as the "cornerstone" of its opinion granting the preliminary injunction, a requirement of the protest and pay avenue cannot stand as an adequate remedy:

> Defendants' (CUSTOMS SERVICE) irreparable harm argument may be readily disposed of as this Court after hearings and perusing numerous documents found that absent the granting of the preliminary injunction plaintiffs would be irreparably harmed. This finding was the major cornerstone in granting plaintiffs the preliminary injunction on August 31, 1982. Appendix, p. A19.

To cause a party to suffer even one day of irreparable injury because a governmental agency has failed to follow minimum due process safeguards is unconstitutional. For a Court to endorse it is to fail in its duty to uphold the Constitution.

The government contends in this case, and the Court of Appeals for the Federal Circuit has affirmed, that an administrative agency may justifiably break the law, free of judicial review and regardless of the harm inflicted upon the public, until completion of the protest procedure illustrated by statute. This case demands review by the Supreme Court to fix the standards which could possibly authorize an administrative agency to act in this fashion: (1) to justifiably break the law; (2) to hide behind the cloak of presumptively fair administrative rule making when the agency admittedly violated statute and procedure thus depriving itself of that cloak; and (3) to define that period of time through which an importer must suffer harm from the agency's lawless behavior until saved by the process of judical review. In summary, the public is protected from lawless agency action by the courts, who must strictly enforce adherence to any procedural safeguard. If departure from a given procedural safeguard causes irreparable harm, the importer must have access to the judiciary for protection. The issue of agency adherence to procedural safeguards is long settled when applied to agencies other than the Custom Service.

This issue was recently clarified by the Supreme Court in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company,* 51 U.S.L.W. 4953, 4956 (U.S. June 24, 1983) where Justice White stated:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atkinson, T. & S. F. R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 807-808 (1973). Accordingly,

> an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

It should be noted that the procedural safeguards of notice and hearing were adhered to in *Motor Vehicle Manufacturers Association, supra,* but that the Supreme Court held that merely following procedure was not enough to preserve due process.

The Supreme Court has taken the position with respect to administrative agency action that the agency must act reasonably in its rule making: the strict adherence to procedural safeguards being taken completely for granted. However, when the Customs Service is involved, because of the anomalous separation of federal court opinions, the courts do not even recognize the necessity of strict adherence to procedural safeguards. The Supreme Court is light years ahead of the archiac precedent of the Court of International Trade and Court of Appeals for the Federal Circuit. This case cries out for a mandate from the Supreme Court to the Court of Appeals for the Federal Circuit, that the Customs Service is not a law unto itself, but must adhere to the same Constitution as any governmental agency.

Citing from the opinion of Judge Landis in the Court of International Trade, the trial court in the instant case, it must be noted that:

> As a ruling TAA #10 established a uniform practice under 19 CFR § 177.10(b). Since the unpublished telex ruling in issue abrogated TAA #10 and imposed a higher rate of duty or charge on the merchandise in question, the telex ruling must find that TAA #10 was clearly wrong. 19 CFR § 177.10(b). However,

> there is no indication that this ruling found TAA #10 to be clearly wrong. Further, before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review must be published in the Federal Register and interested parties must be given the opportunity to make written submission as to the correctness of the contemplated change. 19 CFR § 177.10(c). The court has not been able to uncover the required publication in the Federal Register nor had defendant come forward with such evidence. Appendix, p. A8.

Although later stipulations by the government admit the wholesale failure of the Customs Service to follow the procedure mandated by regulation and imposed by statute, the significance of this procedural massacre is enforced by Judge Landis. Does the Supreme Court intend that an opinion of the Court of Appeals for the Federal Circuit authorizing such departures from procedural requirements serve as the law of the land? If so, does the Constitution not require an elaboration by the Supreme Court as to the reasons that the Customs Service is above the Constitution.

I am loathe to implore this Court to grant this petition merely so as to let right be done, but there is absolutely no question that if the petition were granted the decision of the Court of Appeals for the Federal Circuit would be reversed.

I. Mistake As to the Nature of the Action

The Court of Appeals for the Federal Circuit insists that the plaintiff will ultimately have access to a court

for a determination of the proper amount of duty on the imported merchandise, thus characterizing this case as a valuation dispute. The case presented however, was one of the failure of an administrative agency to follow the due process safeguards mandated by its own regulations calling for:

(1) publication of an intention to revoke a published ruling;

(2) the requirement that hearings be held prior to revocation; and,

(3) revocation only upon a finding that the ruling was clearly wrong.

If the Customs Service followed its own regulations in this case, AAP would suffer no harm regardless of the value eventually determined for the subject merchandise for the reason that AAP could have collected the required duty in any amount from its consignees at the time the merchandise was delivered in the United States.

II. Mistake As to Binding Facts

The Court of Appeals for the Federal Circuit states that the facts of the case are in dispute. There is no evidence in the record of any disputed facts. The trial court made specific findings of fact upon which legal conclusions were drawn. An appeal was taken from those legal conclusions. The Court of Appeals for the Federal Circuit had the right to affirm the legal conclusions or to reverse them. Instead, the Court of Appeals for the Federal Circuit mysteriously gives itself the right to a *de novo* review of the case, minus any hearings or testimony, and without stating any facts concludes that the *findings of the trial court* are now *disputed facts*.

III. Mistake As to Precise Constitutional Violation

The Court of Appeals for the Federal Circuit fails entirely to grasp the exact constitutional challenge made by the plaintiff. Wrongful actions by the government are a direct violation of the Constitution when they deprive a citizen of his property without due process of law, which was done in this case by failing to adhere to appropriate procedural safeguards thereby causing irreparable harm. AAP has never made the argument, as the Court of Appeals for the Federal Circuit opinion suggests, that

> Every instance in which the Government fails to act in accordance with a statute or regulation does not raise a constitutional issue. Indeed, the purpose of judicial review in customs cases is to determine the correctness of governmental action. Thus, the "exception" to the holding of *Uniroyal* which the importers seek to create appears to us to encompass all such cases. An importer would need only to express a challenge, for example, to valuation which is involved here, in terms of a constitutional wrong. We entirely agree with the Court of International Trade that the traditional avenue of approach to the court under 28 U.S.C. § 1581(a) was not intended to be so easily circumvented, whereby it would become merely a matter of election by the litigant. By artful pleading alone a litigant would be able to change the entire statutory scheme Congress has established.

The Court of Appeals for the Federal Circuit suggests that the law preventing judicial review of any Customs Service action prior to exhaustion of the protest remedy prevents jurisdiction. How can this be? The law preventing judicial review *presumes* adherence by the Customs Service to its own governing statutes and

regulations. If a statute prevents Customs from revoking its rulings without notice and hearing, how can that statute be subservient to a statute preventing judicial review prior to exhaustion of the protest procedure? The Plaintiff points to the complete failure of the Customs Service to afford notice and hearings revoking its rulings. The revocation of the rulings without notice causes the irreparable injury to the plaintiff. It is the failure to follow procedural due process that is a direct violation of the Constitution.

IV. Mistake As to Reasonableness of Reliance by AAP

Let us make no mistake about precisely what plaintiff did. Plaintiff saw Congress enacting a new valuation law. Plaintiff was concerned because its business survival depended upon knowing with exactness what method of valuation would be employed. Plaintiff was comforted by the Committee Reports that the new method of valuation would result in only minor fluctuations in value and duty; but again, the question was of such seriousness to the business that further steps were taken. The Customs Service, which was familiar with the business of plaintiff and plaintiff's customers, having investigated said affairs thoroughly in connection with a prior valuation ruling compiled in 1972 (C.I.E. 15-73), initiated at plaintiff's request a ruling which would resolve the question of precisely what the method of valuation would be as it affected plaintiff's business. The ruling was obtained and was published in the Customs Bulletin.

Challenges were made to the ruling and its was reconsidered. But in July of 1981, it was reaffirmed. Then on September 9, 1981, an unpublished telex in violation of all procedural safeguards was sent out to all ports of

entry, directing the tripling of duty, and directing the predisposition of future protests, effectively barring the avenue of meaningful protest and review.

The Court of Appeals for the Federal Circuit seems to suggest that this may have been justified because the ruling was based upon facts which the office of regulations and rulings concluded conflicted with trade patterns stated in the ruling. Again, the Court of Appeals for the Federal Circuit departed from the finding of fact made by the trial court. The trial court completed an *in camera* inspection of the Report of Investigation and considered it to be not material. All rulings are based upon facts. The Customs Regulations specifically provide that no change in a published ruling may issue unless the ruling is determined to be clearly wrong. 19 CFR § 177.10(b). Therefore, the regulations contemplate a situation where Customs may discover that the ruling is wrong; and in its regulations, set forth a duty nevertheless of publication, hearing and an announced finding that the ruling is clearly wrong.

Therefore, in a light most favorable to the Customs Service, there is absolutely no justification for their failure to follow the regulations. The decision by the Court of Appeals for the Federal Circuit which deviates from the findings of Judge Landis in the trial court, and then the misapprehension of the Court of Appeals for the Federal Circuit concerning the application of these so-called different facts to the case, constitutes the most elementary error.

V. Mistake As to Availability of a Sure Remedy

The Court of Appeals for the Federal Circuit asserts that AAP was somehow imprudent to rely upon the fact

that the Customs Service would have to adhere to procedural safeguards implicit in the existence of a published ruling. The Court advances the theory that AAP could have, prior to exportation, invoked the jurisdiction of the Court of International Trade under § 1581(h):

> Moreover, had Air Parcel wished to avoid the financial distress in which it finds itself, judicial relief was available prior to importation under [28] U.S.C. § 1581 (h), as discussed *infra*. Appendix, p. A29.

This conclusion as to the availability of a remedy supports the major portion of the Court of Appeal for the Federal Circuit's opinion. After all, all that the plaintiff has asked for is a remedy. If plaintiff had a remedy, and did not pursue it, then plaintiff has no standing to complain.

But then, the Court of Appeals for the Federal Circuit discusses the availability of 19 U.S.C. § 1581(h), and concludes inconsistently, that such a remedy would be unavailable to the plaintiff. This is clear error.

When we inquire as to why the declaratory relief under 19 U.S.C. § 1581(h) is unavailable we find a ridiculous error.

There is a ridiculous error compounded in the opinions of the Courts below. Fundamental law, erroneously cited in a Committee report, is adopted by the Court of International Trade. The mistatement in the opinion of this lower court is then quoted with approval in the opinion of the Court of Appeals for the Federal Circuit.

Judge Landis in the trial court determined that the provisions of 28 U.S.C. § 1581(h) providing for the equivalent of declaratory relief with respect to prospective importations, could not apply because the ruling upon which AAP sought review was an "internal advice ruling."

Judge Landis, as support for this conclusion, stated as follows:

> In support of its contention defendants [Customs Serice] cite directly a portion of the law's legislative history. . . "In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review,' both of which relate to completed import transactions. [emphasis supplied]. H. R. Rep. No. 96-1235, *supra*." The Court believes that the underscored legislative history is convincing. Appendix, p. A32.

Judge Landis relies upon a Committee report which does not have the force of law. The Committee Report is plainly erroneous because 19 CFR § 177.11, defining "Requests for Advice by Field Offices" provides:

> (a) *Generally.* Advice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transactions may be requested by Customs Service field offices from the Headquarters Office at any time, whether the transaction is *prospective,* current, or completed [emphasis added].

How can the Committee announce that an Internal Advice ruling pertains to completed transactions only, when the regulations which have the force of law state that such rulings may be *prospective*? And how can a Court of first impression, and then a court on appeal, make the same mistake? AAP's Brief on Appeal to the Court of Appeals for the Federal Circuit, specifically calls this error to the attention of the Court. Notwithstanding the specific outline of the judicial error in this crucial portion of Judge Landis' opinion, Judge Nies of the Court of Appeals for the Federal Circuit compounded the error by actually quoting

the same words of Judge Landis, in her opinion, as follows:

> The Court of International Trade was persuaded that the term "ruling" in § 1581(h) did not include a response to a request for internal advice. The court stated: . . . In support of its contention defendants [Customs Service] cite directly a portion of the law's legislative history. . . "In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review,' both of which relate to completed import transactions. [emphasis supplied]. H. R. Rep. No. 96-1235, *supra*." The Court believes that the underscored legislative history is convincing. Appendix, p. A32.

As this was the reason for Judge Landis' finding of no jurisdiction under 28 U.S.C. § 1518(h), and therefore the vacation of an injunction, this error alone was reversible error when reviewed by the Court of Appeals for the Federal Circuit. Their failure to read a clear regulation presented by counsel underscores our earlier, perhaps presumptuous statement, that if the Supreme Court were to grant this petition the opinion below would of necessity be reversed.

The Court of Appeals for the Federal Circuit assumes that a decision under section 1581(h) would forever resolve the dilemma of AAP. But what if AAP, after obtaining the decision from the Court of International Trade under § 1581(h) brought a shipment into Detroit of the subject merchandise. The Customs Service could assert that this importation was "different" and AAP would be powerless to go to the Court of International Trade. AAP

would have to protest the liquidation of the entry and perhaps obtain an adjudication 2 years hence. Some might say surely the Customs Service would not be so bold as to defy the import of *res judicata*. But is it beyond peradventure? Who would suppose that the Customs Service would defy its own regulations or the statutes which govern it? They have done so in this case. Under the mandate of the opinion in this case set down by the Court of Appeals for the Federal Circuit, the Court of International Trade would be bound as a lower court to stand by and watch the complete destruction of a fine business until the conclusion of the protest remedy. Does the Supreme Court mean to authorize the Customs Service to depart from the standards which govern all other administrative agencies? The decision in this case is not nearly as important as a statement from the Supreme Court either bolstering the separate status of the Customs Service; or alternatively, holding that the Constitution governs all administrative agencies equally.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Federal Circuit.

Respectfully submitted,

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January 12, 1984

APPENDIX

Slip Op. 82-69

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 82-2-00165

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., a Hong Kong Corporation; and E. C. McAFEE COMPANY, a Michigan Corporation, for the Account of American Air Parcel Forwarding Company, Ltd.,
Plaintiffs,

v.

UNITED STATES OF AMERICA; THE SECRETARY OF THE TREASURY; UNITED STATES CUSTOMS SERVICE; THE COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE; THE ASSISTANT COMMISSIONER OF CUSTOMS (COMMERCIAL OPERATIONS), UNITED STATES CUSTOMS SERVICE; DIRECTOR, OFFICE OF REGULATIONS AND RULINGS, UNITED STATES CUSTOMS SERVICE; AND DISTRICT DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DETROIT, MICHIGAN; Jointly and Severally,
Defendants.

Before LANDIS, JUDGE

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

[Plaintiffs motion granted
to the extent indicated.]

Dated August 31, 1982

Richard A. Kulics, attorney for plaintiff E. C. McAfee Company, a Michigan Corporation, for the Account of American Air Parcel Forwarding Company, Ltd.

Goodman, Miller & Miller (*Jonathan Miller* of counsel) for the plaintiff American Air Parcel Forwarding Company, Ltd., a Hong Kong Corporation.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Susan L. Handler-Menahem* and *Madeline Kuflik* of counsel) for the defendants.

LANDIS, Judge: In this action involving the valuation of made-to-measure clothing produced in Hong Kong, plaintiffs move for a preliminary injunction pursuant to Rule 65 of this Court.

The court held a hearing on the preliminary injunction motion and, during the hearing, denied defendant's motion to dismiss the action (R-9). Defendant further moved to quash certain subpoenae duces tecum and for a protective order regarding certain documents. The court reserved ruling as to the documents in issue, ordering that they be produced for an *in camera* inspection to determine whether they could be released to opposing counsel. The court permitted the subpoened witnesses to testify only as to matters outside the scope of the documents submitted for the *in camera* inspection.

Subsequently, the court promulgated a written order holding that the documents related to an ongoing criminal proceeding which may be seriously impaired, if not completed abrogated, if the documents were released even under protective order. The court also ordered that both sides submit supplemental memoranda if they so desired.

After submission of said memoranda a further hearing was held on the preliminary injunction motion. Since the latter hearing plaintiffs have submitted a motion to file a supplemental memorandum of law, opposed by defendant and, additionally, have filed a motion for summary judgment.

The factual background indicates that on *October 17, 1980,* the United States Customs Service issued a ruling. *Export Value: Dutiability of Sales from Manufacturers to Distributors,* C.S.D. 81-72, (TAA#10). This ruling was premised upon the facts that distributors in Hong Kong employ representatives who take orders from customers in the United States. The distributors then contract with various small tailoring establishments in Hong Kong to produce the garments.[1] These tailors are responsible for all aspects of production including the purchasing of fabrics from piecegood houses. The tailors sell the completed garments to the distributors.

This ruling basically held that the sales between tailors and distributors in Hong Kong of made-to-measure clothing are appropriate for establishing export value provided the price to the distributors includes all the essential elements of value, including the costs incurred by the tailors in purchasing the required fabrics. The ruling further held that under the specific circumstances of this case, sales between tailors and distributors in Hong Kong may be used to establish the price actually paid or payable for the merchandise when sold for exportation to the United States under section 402(b) of the Trade Agreements Act of 1979, providing the requirements set forth in that statutory provision for establishing transaction value are satisfied.

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1. These small tailoring establishments allegedly belong to the *Hong Kong Tailoring Contractors Association.* This association meets each year and sets the uniform price that is to be paid by buyers for cut, make and trim operations.

It should be noted that C.S.D. 81-72 is a response to a memorandum by the District Director of Detroit, Michigan, dated January 16, 1980, which requested internal advice regarding the importation of made-to-measure clothing from Hong Kong. It was based upon unverified facts submitted in the internal advice request and apparently upon some information furnished by plaintiff American Air Parcel's attorney. By memorandum dated October 8, 1980, the Director, Duty Assessment Division, Headquarters, requested the Office of Investigations to initiate an inquiry to verify the description of the Hong Kong wearing apparel trade.

On March 12, 1981, the District Director, Port of San Francisco, requested Headquarters to reconsider ruling TAA#10 submitting a memorandum in support thereof.

On July 23, 1981, Headquarters (Director, Classification and Value Division) affirmed TAA#10. This ruling was based upon the description of the Hong Kong apparel trade as set forth in the original internal advice request of which TAA#10 was a product.

On August 21, 1981, the Office of Regulations and Rulings reported that they reviewed and analyzed various other rulings and reports[2] and concluded that the trade patterns in the made-to-measure clothing industry in Hong Kong conflict with a decision relied upon for the issuance of TAA#10 and other rulings.

On September 9, 1981, the United States Customs Service issued an internal, unpublished telex from Head-

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2. These rulings and reports include:

Made to Measure Clothing from Hong Kong; TAA#10, dated October 17, 1980; Headquarters Ruling 542406, dated July 23, 1981; Hong Kong Report of Investigation HR01CR103504, dated June 12, 1981; Detroit, Michigan and San Francisco, California Analyses of Report of Investigation, dated August 5, 1981, and August 7, 1981, respectively.

quarters to the field offices requiring the assessment of duties *on the basis of the price paid by the United States consumer to the Hong Kong distributor* instead of the price paid by the Hong Kong tailor to the Hong Kong distributor. This, in effect, completely abrogated ruling TAA#10.

Plaintiff's Freedom of Information Act (FOIA) request for the evidentiary basis of this decision was denied on September 29, 1981, and said denial was affirmed by the United States Customs Service following plaintiff's administrative appeal on the ground that the Customs investigation had been converted into an enforcement proceeding.

Plaintiff next made an informal administrative appeal to U. S. Customs Service Headquarters. During the pendency of this hearing several hundred entries previously made were immediately liquidated on the basis of the unpublished telex of which plaintiff was not officially informed of until October 19, 1981. On December 3, 1981, plaintiff participated at a hearing held in U. S. Customs Service Headquarters in Washington, D. C.

Plaintiff, an American firm with offices in Hong Kong, consolidates large shipments of these completed garments in Hong Kong and forwards them to Detroit by air freight. This firm files entries in Detroit, allegedly paying required duties from their own account, and then further forwards the garments, C.O.D., by commercial carrier, (such as United Parcel Service,) to the ultimate United States purchaser. Included in the C.O.D. payment is the duty that plaintiff is responsible to pay. Once plaintiff receives the C.O.D. payment, it cannot look to the ultimate purchaser nor the distributor to subsidize any increase in duty. Plaintiff argues that it is particularly injured by the abrogation of TAA#10 because it relied upon this

ruling in setting its ultimate C.O.D. charges. Plaintiff states that such injury is sufficient to drive it out of business.

Plaintiffs seek the following relief: (1.) Reinstatement of the C.S.D. 81-72 ruling which holds that sales between tailors and distributors in Hong Kong of made-to-measure clothing are appropriate for establishing export value; (2.) Enjoining the Customs Service from liquidating the subject made-to-measure clothing; (3.) Cancelling prior liquidations of made-to-measure clothing not in accordance with C.S.D. 81-72; (4.) Allowing all protests with respect to entries liquidated under the September 9, 1981 telex; and (5.) Requiring the Customs Service to provide a record of the legal or factual differences found in any Report of Investigation or in any other manner, disagreeing with the facts in TAA#10, and the facts presented at the December 3, 1981, hearing held in Washington, D. C., which are material and relevant to the treatment of the transactions between Hong Kong firms and distributors.

The revocation of C.S.D. 81-72 (TAA#10) is not explained by defendant. It may have been based upon an investigation, the report of which has been determined confidential by this Court because it involves an ongoing investigation that could lead to criminal sanctions and penalties against officers of plaintiff American Air. On the other hand it may have been based upon other factors unbeknown to the court. In any event, this is a motion for a preliminary injunction.

Generally, four conditions must be met before a preliminary injunction is granted. There must be a threat of immediate irreparable harm; a showing that the public interest would be better served by issuing than by denying the injunction; that there is a likelihood of success on the

merits; and that the balance of hardship on the parties favors the party seeking injunctive relief. *S. J. Stile Associates Ltd., et al. v. Dennis Snyder, et al.*, 68 CCPA ....., C.A.D. 1261, 646 F2d 522 (1981); *Asher v. Laird*, 475 F.2d 360 (D.C. Cir. 1973); *American Air Parcel Forwarding Company, Ltd., A Hong Kong Corporation v. United States*, 1 Ct. Int'l. Trade 293, 515 F. Supp. 47 (1981); *PPG Industries, Inc. v. United States, et al.*, 2 Ct. Int'l Trade ....., Slip Op. 81-59 (July 6, 1981).

It is the party seeking the preliminary injunction who has the burden of demonstrating the existence of the four factors or a proper combination thereof. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953); *Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953 (2d Cir. 1973). It is generally the purpose of a preliminary injunction to grant a party a meaningful opportunity to present his case at a full trial on the merits and to obtain proper relief if so warranted. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Its nature is essentially to preserve the status quo pending final determination after a full hearing. *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319 (2d Cir. 1969).

It is against this criteria that the court will examine plaintiffs' motion for a preliminary injunction and evaluate the substantiating evidence.

In reviewing reasonable likelihood of success on the merits standard, it must be remembered that C.S.D. 81-72 (TAA#10) is an official ruling by Customs Headquarters. It was promulgated after a request for internal advice and subsequently published in the Customs Bulletin (15 Cust. B. & Dec. Vol. 10, p. 45) pursuant to 19 CFR §177.10(a). The Chief of the Value Branch of the Division of Clas-

sification and Valuation, Irving W. Smith Jr., specifically stated on redirect examination that TAA#10 is a ruling (R. 66).

As a ruling TAA#10 established a uniform practice under 19 CFR §177.10(b). Since the unpublished telex ruling in issue abrogated TAA#10 and imposed a higher rate of duty or charge on the merchandise in question, the telex ruling must find that TAA#10 was clearly wrong 19 CFR §177.10(b). However, there is no indication that this ruling found TAA#10 to be clearly wrong. Further, before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review must be published in the Federal Register and interested parties must be given the opportunity to make written submission as to the correctness of the contemplated change 19 CFR §177.10(c). The court has not been able to uncover the required publication in the Federal Register nor has defendant come forward with such evidence.

In view of the foregoing it is not beyond peradventure that plaintiffs have a likelihood of success on the merits. This is not meant to be construed as a procedural or substantive determination of these facts by this Court. It should be construed only that sufficient questions have been raised as to permit plaintiffs further inquiry on a full trial on the merits without losing their position prior to the abrogation of TAA#10.

Under the immediate irreparable harm standard, plaintiffs has not conclusively demonstrated that they will be irreparably harmed without the injunction. However, there is no requirement that plaintiffs demonstrate *conclusively* that they will suffer irreparable harm. Plain-

tiffs must show that there exists a viable threat of serious harm which cannot be undone. *S. J. Stile Associates Ltd. et al. v. Dennis Snyder, et al., supra.* The court will not issue a preliminary injunction merely to prevent a possibility of injury, even though the prospective injury may be great. *PPG Industries Inc. v. United States, supra.* As presently existing, actual threat must be shown. *State of New York v. Nuclear Regulatory Commission,* 550 F.2d 745 (2d Cir. 1977); Wright & Miller, *Federal Practice and Procedure, Civil* §2948 (1973).

In the present action, plaintiffs have adequately demonstrated that there is a real and actual threat of immediate irreparable injury. A cursory look at the difference in valuations and subsequent duties imposed indicates that plaintiffs may readily be driven out of business. In fact, plaintiff American Air is currently in a Chapter XI bankruptcy. Threat to a business enterprise is considered a basis of irreparable injury. This Court has recently stated: "It is difficult for this court to envision any irreparable damage to a plaintiff and his business more deserving of equitable relief than the very loss of the business itself." *Erstine Clark McAfee D.B.A. E. C. McAfee Customs Broker, a Sole Proprietorship v. United States,* 3 Ct. Int'l. Trade ....., 531 F. Supp. 177 (1982). *Seemes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197 (2d Cir. 1970).

In reviewing the balancing of the hardships placed upon the parties, it is evident that the scale tips decidedly in plaintiffs favor. To reiterate, plaintiff *American Air* may be driven out of business as is true of plaintiff *McAfee* if the preliminary injunction is not granted. Further, defendant can be adequately protected by the posting of certain bonds by plaintiffs, *Ohio Oil Company v. Conway,* 279 U.S. 813 (1929). The bonds posted pursuant to Rule 65(c) will protect the public interest and the revenue derived

from import duties. In view of this protection, it is in the public interest to impose this preliminary injunction with a subsequent full hearing on the merits to insure that defendant is complying with its own regulations pursuant to legislative mandate and affording plaintiffs their right to due process of law.

In conclusion, this Court recognizes that a preliminary injunction is an extraordinary remedy which should be granted sparingly, *Dorfmann v. Boozer*, 414 F.2d 1168 (D.C. Cir. 1969). However, such relief is appropriate where there is a likelihood of success on the merits and the harm to movant is demonstrated to be irreparable. *Blackwelder Furniture Co. v. Selig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). This is especially true where the person against whom the injunction is issued can be adequately protected by bonding or other means, *American Air Parcel Forwarding Company, Ltd., A Hong Kong Corporation v. United States*, 1 Ct. Int'l. Trade 293, 515 F. Supp. 47 (1981).

The only issue remaining for determination is the posting of a bond pursuant to Rule 65(c). This Court is fully aware that plaintiff *American Air* is in financial difficulty. It is likely that plaintiff *McAfee* will follow the same route if the injunction is not granted. However, if plaintiffs file single entry bonds for double the amount of ordinary Customs duties of the merchandise in addition to a bond for the sum of twenty five thousand ($25,000) dollars to be filed with the Clerk of the Court of International Trade, defendant will be adequately protected.

Accordingly, it is hereby

ORDERED, that plaintiffs motion for a preliminary injunction is granted on condition that plaintiffs jointly file a bond in the amount of twenty five thousand ($25,000) dollars with the Clerk of the Court of International Trade

pursuant to Rule 65(c) of this Court, and on condition that plaintiffs file single entry bonds in double the amount of ordinary Customs duties of the merchandise entered; and it is further

ORDERED, that C.S.D. 81-72 be reinstated as initially promulgated; and it is further

ORDERED that all prior liquidations not in accordance with C.S.D. 81-72 be cancelled; and it is further

ORDERED that plaintiffs shall post the required Court bond and single entry bonds relating to the cancellations of any prior liquidations within fifteen (15) days of the entry of this order by the Clerk; and it is further

ORDERED that plaintiffs motion to file a supplemental memorandum of law is granted, and has been considered by this Court in the instant decision.

Landis
J.

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., A HONG KONG CORPORATION; AND E.C. McAFEE COMPANY, A MICHIGAN CORPORATION, FOR THE ACCOUNT OF AMERICAN AIR PARCEL FORWARDING COMPANY, LTD.,

Plaintiffs,

v.

UNITED STATES OF AMERICA; THE SECRETARY OF THE TREASURY; UNITED STATES CUSTOMS SERVICE; THE COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE; THE ASSISTANT COMMISSIONER OF CUSTOMS (COMMERCIAL OPERATIONS), UNITED STATES CUSTOMS SERVICE; DIRECTOR, OFFICE OF REGULATIONS AND RULINGS, UNITED STATES CUSTOMS SERVICE; AND DISTRICT DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DETROIT, MICHIGAN; Jointly and Severally,

Defendants.

Court No. 8-2-00165.

United States Court of
International Trade.

Jan. 19, 1983.

OPINION OF DISMISSAL OF THE ACTION

On a motion to dissolve a preliminary injunction and to dismiss for lack of jurisdiction, the Court of International Trade, Landis, J., held that where litigant has access to Court of International Trade under traditional means, it must avail itself of that avenue of approach complying with all relevant prerequisites thereto and cannot circumvent the prerequisites by invoking juris-

diction under the residual jurisdiction provision of the Customs Courts Act.

Motion granted.

1. Customs Duties (Key) 84

Under residual or "catch-all" jurisdiction provision of Customs Courts Act, there is no legislative intent to grant litigant use of Court of International Trade where litigant has failed to exhaust avenue of protest and denial before Customs Service and payment of liquidated duties. 28 U.S.C.A. § 1581(i).

2. Customs Duties (Key) 84

Where litigant has access to Court of International Trade under traditional means, it must avail itself of that avenue of approach complying with all relevant prerequisites thereto and cannot circumvent those requirements by invoking jurisdiction under residual or "catch-all" jurisdiction provision of Customs Courts Act as latter section was not intended to create any new causes of action not founded in other provisions of law. 28 U.S.C.A. § 1581(i).

3. Customs Duties (Key) 84

Internal advice rulings authorized under Customs regulation were not subject to judicial review. 28 U.S.C.A. § 1581(h).

Richard A. Kulics, Detroit, Mich., for plaintiff E.C. McAfee Company, a Michigan Corp., for the Account of American Air Parcel Forwarding Co., Ltd.

Goodman, Miller & Miller, Southfield, Mich. (Jonathan Miller, Southfield, Mich., of counsel), for plaintiff

American Air Parcel Forwarding Co., Ltd., a Hong Kong Corp.

J. Paul McGrath, Asst. Atty. Gen., Washington, D.C., Joseph I. Liebman, Atty. in Charge, Intern. Trade Field Office, Commercial Litigation Branch, New York City (Susan L. Handler-Menahem and Madeline Kuflik, New York City, of counsel), for defendants.

LANDIS, Judge:

Once again this action is before the court to determine various measures of relief sought by the parties.

On August 31, 1982, this court sitting in New York, New York granted plaintiffs' motion for a preliminary injunction. *American Air Parcel Forwarding Company, Ltd., et al. v. The United States, et al.*, 4 Ct. of Int'l. Trade ....., Slip Op. 82-69 (August 31, 1982). Within the next two (2) days, to wit, on September 2, 1982, the Court of Customs and Patent Appeals, (now the United States Court for the Federal Circuit), in Washington, D.C., handed down a decision in *The United States v. Uniroyal, Inc.*, 687 F.2d 467 (1982) reversing the trial court's (this court's) jurisdiction. This decision is discussed hereafter.

Since this court's decision on August 31, 1982, the parties have filed twenty (20) additional documents and numerous correspondences. Additionally, they filed six (6) motions[1] and a hearing was held on certain related

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1. The motions filed are as follows:

a). Defendants' motion to dissolve the preliminary injunction and to dismiss the action for lack of jurisdiction;

b). *Defendants' motion to stay all proceedings* pending determination of defendants' motion to dissolve the preliminary injunction and dismiss the action for lack of jurisdiction;

(Continued on following page)

motions. With the exception of the motion relating to a three judge panel which, pursuant to Rule 77(d)(2) of this court, was referred to the Chief Judge and, in fact, has been denied by Chief Judge Re, (see 1 Ct. of Int'l Trade ....., Slip Op. 82-84 (October 6, 1982)), all pending motions are consolidated for purposes of disposition in this opinion.

Initially, the court will examine defendants' motion to dissolve the preliminary injunction and to dismiss for lack of jurisdiction as the court cannot grant an injunction when it lacks jurisdiction over the subject matter of the action. *Kean v. Hurley,* 179 F.2d 888 (8th Cir.1950).

Plaintiffs brought this action claiming jurisdiction pursuant to 28 U.S.C. § 1581(i) and 28 U.S.C. § 1581(h).[2]

Footnote continued—

c). Plaintiff *American Air Parcel's* ex parte motion to hold the District Director of Customs for Detroit, Michigan, Nicholas Devine and Ray Navarra in contempt for failure to honor this court's preliminary injunction dated August 31, 1982;

d). Plaintiff *American Air Parcel's* motion to void, *ab initio,* a certain telex issued by Customs known as 73-28;

e). Plaintiff *E.C. McAfee's* motion for a three judge panel;

f). Plaintiff *American Air Parcel's* ex parte motion to shorten time for defendants' response to the motion for a three judge panel.

2. These statutes read as follows:

28 U.S.C. § 1581(i)

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(Continued on following page)

Defendants claim that this court lacks jurisdiction as plaintiffs have not exhausted their administrative remedies provided by statute.

[1] Reviewing 28 U.S.C. § 1581(i), frequently referred to as the residual or "catch-all" jurisdiction provision, the court finds no legislative intent to grant a litigant use of this forum where the litigant has failed to exhaust the avenue of protest and denial before the Customs Service and payment of liquidated duties. In the leading case recently issued by the United States Court of Customs and Patent Appeals, (now the United States Court for the Federal Circuit), the court succinctly stated:

> Nevertheless, the legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize

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Footnote continued—

(2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(h)

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

an avenue for effective protest before the Customs Service.

The United States v. Uniroyal, Inc., 687 F.2d 467, 471 (Cust. & Pat.App.1982).

[2] It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581 (a) by invoking jurisdiction under 1581(i) as the latter section was not intended to create any new causes of action not founded on other provisions of law.[3]

Defendants next contend that this court lacks jurisdiction under 28 U.S.C. § 1581(h) as the subject merchandise has been imported, liquidated and entered into the stream of commerce. Furthermore, defendants contend that this court's power under section 1581(h) is limited to declaratory relief pursuant to 28 U.S.C. § 2643.

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3. The House of Representatives' report accompanying the Customs Courts Act of 1980 referring to 1581(i) reads in pertinent part:

> Subsection (i) is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law.
>
> *The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade.* This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will ensure that these suits will be heard on their merits.
>
> (Emphasis supplied)

H.R.Rep. No. 96-1235, 96th Cong., 2d Sess. 47 (1980), U.S.Code Cong. & Admin.News 1980, pp. 3729, 3759.

This part of defendants' motion affects the twelve entries listed in the summons. These entries were imported into this country between March 3, 1980 and August 1, 1980. The ruling in issue, C.S.D. 81-72 (TAA # 10), was promulgated on October 17, 1980. Thus, TAA # 10 was issued *subsequent* to the twelve entries set forth in the summons.

When this court originally issued the injunction on August 31, 1982, it relied upon its general equity powers in conjunction with 28 U.S.C. § 1581(i) for subject matter jurisdiction over the previously imported goods. Although sparse, the case law developed at the time the injunction issued generally indicated that under proper circumstances the court could invoke subject matter jurisdiction in lieu of the usual protest avenue of review.

In *Wear Me Apparel Corporation v. United States*, 1 Ct.Int'l. Trade 60 (1980), the court denied a preliminary injunction brought pursuant to section 1581(i)(3) and (4). However, the court specifically stated:

> *The Court wishes to stress that its ruling herein should not be interpreted to mean that exhaustion of administrative remedies is invariably a condition precedent to granting preliminary injunctive relief.* (Slip Op. 80-13 at 6). (Emphasis in original)

See also, *Wear Me Apparel Corporation v. United States of America, et al.*, 1 Ct.Int'l. Trade 194, 511 F.Supp. 814 (1981).

Defendants final jurisdictional assault relates to the prospective importation of merchandise under section 1581(h). Here, defendants argue that plaintiffs must adhere to the traditional method of judicial review by initially having a protest denied. Specifically, defendants contend that the subject ruling is not a ruling in the

meaning of section 1581(h) as it was an internal advice ruling and, additionally, that defendants have not met the stringent standards of proving irreparable harm.

Defendants' irreparable harm argument may be readily disposed of as this court after hearings and perusing numerous documents found that absent the granting of the preliminary injunction plaintiffs would be irreparably harmed. This finding was the major cornerstone in granting plaintiffs the preliminary injunction on August 31, 1982.

[3] Of paramount interest is defendants' argument relating to the type of ruling to which section 1581(h) applies. The ruling in issue, TAA # 10, is an internal advice ruling which is authorized under Customs regulations, 19 C.F.R. § 177.11. Defendants argue that Congress specifically exempts internal advice rulings from being subject to judicial review under section 1581(h). In support of its contention defendants cite directly a portion of the law's legislative history.

> The time-honored rule is that the court does not possess jurisdiction to review a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury unless it relates to a subject matter presently within the jurisdiction of the United States Customs Court, for example, as action brought pursuant to section 515 of the Tariff Act of 1930. The Committee intends a very narrow and limited exception to that rule. The word 'ruling' is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction. *In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review', both of which relate to completed*

import transactions. (Emphasis supplied). H.R.Rep. No. 96-1235, *supra*, 46, U.S.Code Cong. & Admin.News 1980, p. 3758.

The Court believes that the underscored legislative history is convincing.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that defendants' motion to dissolve the preliminary injunction issued August 31, 1982 and to dismiss the action is, in all respects granted; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff American Air Parcel's motion to hold the District Director of Customs, Detroit, Michigan, Nicholas Devine, and Ray Navarra in contempt is denied as moot; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff American Air Parcel's motion to void *ab initio* telex 73-28 is denied as moot; and it is further

ORDERED, ADJUDGED AND DECREED that defendants' motion to stay all proceedings pending decision on the motions to dissolve the preliminary injunction and to dismiss the action is denied as moot; and it is further

ORDERED, ADJUDGED AND DECREED that this action is hereby dismissed.

Let judgment enter accordingly.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-716.

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., a Hong Kong Corporation; and E.C. McAFEE COMPANY, a Michigan Corporation, for the Account of American Air Parcel Forwarding Company, Ltd.,
Appellants,

v.

UNITED STATES OF AMERICA: THE SECRETARY OF THE TREASURY; UNITED STATES CUSTOMS SERVICE; THE COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE; THE ASSISTANT COMMISSIONER OF CUSTOMS (COMMERCIAL OPERATIONS), UNITED STATES CUSTOMS SERVICE; DIRECTOR OFFICE OF REGULATIONS AND RULINGS, UNITED STATES CUSTOMS SERVICE; and DISTRICT DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DETROIT, MICHIGAN, Jointly and Severally,
Appellees.

DECIDED: October 14, 1983

OPINION OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT AFFIRMING THE OPINION OF DISMISSAL OF THE ACTION BY THE COURT OF INTERNATIONAL TRADE

Before FRIEDMAN and NIES, *Circuit Judges*, and SKELTON, *Senior Circuit Judge*.

NIES, *Circuit Judge*.

This is an appeal from a final order of the United States Court of International Trade, 557 F. Supp. 605

(Ct. Int'l Trade 1983), dismissing an action in which appellant importers challenge the basis on which the United States Customs Service has made and is making its valuation of made-to-measure clothing produced in Hong Kong. The Court of International Trade held that jurisdiction over the action could not be founded on 28 U.S.C. § 1581(h) and (i) as asserted by the importers. We affirm.

Background

American Air Parcel Forwarding Company, Ltd., a Hong Kong corporation, is a foreign freight consolidator which handled shipments from Hong Kong to the United States of made-to-measure clothing which is the subject of this action.

E.C. McAfee Company is a customshouse broker and is the importer of record of the 12 entries listed in an attachment to the pleadings.

The facts of the transactions are disputed by the parties and we will say only that the subject clothing is custom made by tailors in Hong Kong for individual U.S. customers who order the merchandise in the United States through salesmen for Hong Kong distributors.

The present appeal stems from the efforts of appellants (collectively "importers") to bar the assessment of duty based on the sales price paid by the United States consumer (approximately $200.00). Importers assert that the valuation must be based on the payment in Hong Kong by the distributors to tailors for "cut, make and trim" operations plus the cost of material (approximately $75.00).

While only 12 specific entries are identified in an attachment to the pleadings, appellants assert that hundreds of additional unliquidated entries, as well as future

importations, are the subject of the complaint. The complaint itself is couched in broad terms of seeking "review of the arbitrary and capricious revocation of a ruling issued by the U.S. Customs Service and the arbitrary and capricious refusal by that agency and its representatives to rescind that revocation." Jurisdiction is asserted under 28 U.S.C. § 1581(h) and (i)(4).[1]

With respect to the identified shipments, these entries were made in Detroit between March 3, 1980, and August 1, 1980, by McAfee, for the account of Air Parcel,

---

1. 28 U.S.C. 1581 provides in pertinent part:

1581. Civil actions against the United States and agencies and officers thereof

* * *

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

who paid estimated duties based on the Hong Kong transactions. Air Parcel billed only this amount to the U.S. consumer in addition to the charge for the merchandise. Apparently other Customs field offices proposed to assess identical merchandise at the price paid by U.S. consumers on the ground that there was no "sale" in Hong Kong within the meaning of the applicable statute. In January 1980 the District Director of Detroit, Michigan, at the behest of the importers, initiated a request for internal advice from the Office of Regulation and Rulings. Based on representations by the importers as to the facts of the Hong Kong apparel trade, the response was made on October 17, 1980, with certain provisos, that:

> *Holding.* — On the basis of the information provided, it is our opinion that the sales between the tailors and distributors in Hong Kong of made-to-measure clothing are appropriate for establishing export value under the new law . . . .

This holding is denominated TAA # 10 and was published in the Customs Bulletin on March 11, 1981.

On March 12, 1981, the San Francisco District Director requested Customs Headquarters (Director, Classification and Value Division) to reconsider the holding in TAA # 10.

On July 23, 1981, the Customs Service issued a response to the request for reconsideration, affirming TAA # 10, but advising that an investigation to verify the facts upon which the ruling was based had been initiated.

In September 1981 the investigation was completed and the Office of Regulation and Rulings concluded that the trade patterns in the Hong Kong made-to-measure clothing industry conflicted with the pattern stated in the request for internal advice. On September 9, 1981,

a telex was transmitted to Customs offices stating the above conclusion and requiring the assessment of duties on the basis of the price paid by the U.S. consumer.

On October 19, 1981, the Customs Service advised Air Parcel by letter that TAA # 10 was revoked pursuant to 19 CFR § 177.9(d) and that, pursuant to 19 CFR § 177.9 (d)(2)(ii), the revocation was retroactive. This retroactive revocation is the heart of the controversy.

In November 1981 the 12 identified entries were liquidated with duties being assessed on the price paid by U.S. consumers. A protest was duly filed by McAfee on February 1, 1982. On February 4, 1982, no action having been taken on the protest and no payment having been made of liquidated duties, the importers filed a complaint in the Court of International Trade, followed by a motion for preliminary injunction seeking, *inter alia*, cancellation of these liquidations and reinstatement of TAA # 10. The Government moved to dismiss for lack of jurisdiction. The court denied the motion to dismiss and granted the motion for a preliminary injunction on August 31, 1982. Within a few days thereafter, the Court of Customs and Patent Appeals handed down a decision in *United States v. Uniroyal, Inc.*, 687 F.2d 467 (CCPA 1982), defining the scope of jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(h) and (i). On the basis of this decision, the court granted the Government's renewed motion to dismiss and dissolved the injunction by order of January 19, 1983. The importers appeal from this order.

Importers allege that as a practical matter they are unable to collect additional duties from U.S. consumers after merchandise is delivered inasmuch as cost of collection exceeds the amount involved. Because of the revocation of TAA # 10, and the greatly increased duties

it must pay on hundreds of entries, Air Parcel asserts that it has been driven into bankruptcy.

I

The Court of International Trade, in holding that 28 U.S.C. § 1581(i) did not grant jurisdiction to the court over the complaint, provided the following analysis:

> Reviewing 28 U.S.C. §1581(i), frequently referred as the residual or "catch-all" jurisdiction provision, the court finds no legislative intent to grant a litigant use of this forum where the litigant has failed to exhaust the avenue of protest and denial before the Customs Service and payment of liquidated duties. In the leading case recently issued by the United States Court of Customs and Patent Appeals, (now the United States Court for the Federal Circuit), the court succinctly stated:
>
> > Nevertheless, the legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service.
>
> *The United States v. Uniroyal, Inc.*, 687 F.2d 467, 471, Appeal 82-9 (September 2, 1982).
>
> It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. §1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) . . . .

557 F. Supp. at 607.

The above interpretation of the *Uniroyal* decision is entirely correct. Importers argue, however, that the *Uniroyal* holding itself recognizes that the traditional avenue of protest and appeal under § 1581(a) need not be utilized if it does not provide an "effective" remedy, *supra*, or if "inadequate as a matter of due process." (687 F.2d at 475 Nies, J., concurring).

Importers assert that the § 1581(a) remedy is ineffective, as a matter of due process, in three well defined areas: (1) where a complaint raises a constitutional question, (2) where the Customs regulations have built unconscionable delay into the protest and review procedures, and (3) where procedures to safeguard the rights of the public are violated.

A

In essence, the constitutional issue asserted by importers is that there is a denial of due process whenever an agency fails to follow either a statute or a regulation which has the force of law. "Unlawful actions" by the Government, in the importers' view, "are a direct violation of the Constitution." The importers cite no authority for their proposition nor propose any limitation, and we find the importers' thesis basically unsound. Every instance in which the Government fails to act in accordance with a statute or regulation does not raise a constitutional issue. Indeed, the purpose of judicial review in customs cases is to determine the correctness of governmental action. Thus, the "exception" to the holding of *Uniroyal* which the importers seek to create appears to us to encompass all such cases. An importer would need only to express a challenge, for example, to valuation which is involved here, in terms of a constitutional wrong. We entirely agree with the Court of International Trade that

the traditional avenue of approach to the court under 28 U.S.C. § 1581(a) was not intended to be so easily circumvented, whereby it would become merely a matter of election by the litigant. By artful pleading alone a litigant would be able to change the entire statutory scheme Congress has established. The different requirements of § 1581(a) and § 1581(i) with respect to standing (28 U.S.C. § 2631); statutes of limitation (28 U.S.C. § 2636); amendment of claims (28 U.S.C. § 2638); burden of proof (28 U.S.C. § 2639(a)(1)); and standards of appellate review (28 U.S.C. § 2640) would become optional.

The importers attempt to draw a parallel between the instant case and *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which an individual who had been deprived of a disability benefit without a hearing prior to the cancellation of benefits was allowed judicial review of the issue of whether such hearing was necessary as a matter of due process without going through a post-cancellation hearing prescribed by agency regulations. Contrary to the importers' view, the *Eldridge* case does not support their position. In *Eldridge*, the claimant did not seek to avoid the statutory jurisdiction requirements but to invoke the court's jurisdiction pursuant to the statute. Crucial to the *Eldridge* decision on the jurisdictional issue was the holding that the only mandatory jurisdictional requirement necessitated by the statute was a "final decision" by the agency and that this "non-waivable jurisdictional element was satisfied." 424 U.S. at 329-30.

Unlike *Eldridge*, importers here seek to avoid the jurisdictional prerequisites set up by the statute. The Customs Service may not waive the statutory requirements that a protest must be *filed* to prevent finality of

assessments,[2] or that duties must be paid before commencing a civil action involving the protest.[3] These provisions would operate irrespective of a suit under 28 U.S.C. § 1581(i). Moreover, had Air Parcel wished to avoid the financial distress in which it finds itself, judicial relief was available prior to importation under 19 U.S.C. § 1581 (h), as discussed *infra*. Importers admittedly were aware prior to the importation of the merchandise that the basis for valuation was disputed and apparently proceeded to enter transactions placing themselves in a precarious position with knowledge of this risk. Their plight cannot be attributed to deficiencies in the statute.

That importers here could fashion a more desirable remedy does not make the remedy fashioned by Congress constitutionally inadequate. As stated in *Jerlian Watch Co. v. United States*, 597 F.2d 687, 692 (9th Cir. 1979), a case in which an importer sought relief in district court[4]

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2. 19 U.S.C. § 1514(a) provides in pertinent part:

> [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise; * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or a civil action contesting the denial of a protest, in whole or in part is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 [28 U.S.C. §§ 2631 *et seq.*].

3. 28 U.S.C. § 2637(a) reads as follows:

> A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade, only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced.

4. As discussed in *United States v. Uniroyal, Inc.*, 687 F.2d 467, 475, n. 9 (Nies, J., concurring) enactment of 28 U.S.C. § 1581(i) transferred the subject matter jurisdiction of the district courts to the Court of International Trade.

to avoid the Customs Courts jurisdictional prerequisite of payment of duty:

> Plaintiffs' allegations of financial impossibility, even if accepted as true, do not place them within the "adequate remedy" exception. The dispositive consideration in determining whether planitiffs have an adequate remedy is the nature of the barrier and not its financial height. Any financial barrier is inherent in the system established by Congress, and must have have been recognized by Congress when it enacted 19 U.S.C. § 1514(a). It is true that injunctive and declaratory relief is a more desirable remedy in plaintiffs' view, but "the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate." *J.C. Penney Co. v. U.S. Treasury Department*, 439 F.2d at 68.

B

Contrary to importers' argument, the Customs Service regulations have not built unconscionable delay into the protest procedure. Indeed, a protestor need not await a decision by the agency before filing suit. The regulations provide an accelerated procedure for reaching the court within 120 days. 19 CFR § 174.22(a)-(d). Upon the filing of a suit, the court has discretion to require exhaustion of administrative remedies, 28 U.S.C. § 2637 (d), and importers' arguments that the usual requirement to exhaust administrative remedies should be waived would be relevant to the exercise of that discretion. However, importers not only failed to utilize the procedure for obtaining accelerated consideration of its protest but also resorted to additional review procedure, thereby further delaying a Customs Service decision. Thus, importers' argument that relief has been delayed for eighteen

months because of the regulations, thereby making judicial review under 5 U.S.C. § 1581(a) deficient as a matter of due process, is wholly without foundation.

C

Importers' final position under 28 U.S.C. § 1581(i) is that the Customs Service must follow its own regulations which are designed to protect the public. While importers devote a substantial portion of their brief to exposition of how the Customs Service violated established procedures, we do not find any relationship between the merits of this argument and the jurisdictional issue. There is no dispute that the issue of violation of a regulation can be raised in a protest and subsequent civil action.

The decision of the Court of International Trade holding that it lacked jurisdiction to entertain the importers' complaint under 28 U.S.C. § 1581(i) is, accordingly, affirmed.

II

As an alternative basis for jurisdiction, importers rely on 28 U.S.C. § 1581(h). The requirements to invoke this provision are:

(1) judicial review must be sought *prior* to importation of goods;

(2) review must be sought of a ruling, a refusal to issue a ruling or a refusal to change such ruling;

(3) the ruling must relate to certain subject matter; and

(4) irreparable harm must be shown unless judicial review is obtained *prior* to importation.

The Court of International Trade was persuaded that the term "ruling" in § 1581(h) did not include a response to a request for internal advice. The court stated:

> Of paramount interest is defendants' argument relating to the type of ruling to which section 1581(h) applies. The ruling in issue, TAA # 10, is an internal advice ruling which is authorized under Customs regulations, 19 C.F.R. § 177.11. Defendants argue that Congress specifically exempts internal advice ruling from being subject to judicial review under section 1581(h). In support of its contention defendants cite directly a portion of the law's legislative history . . . . *"In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review', both of which relate to completed import transactions.* (Emphasis supplied). H.R. Rep. No. 96-1235, *supra*, 46." The Court believes that the underscored legislative history is convincing.

557 F. Supp. at 608.

The Government argues that requests for internal advice can only be made with respect to goods which have been imported. It does appear that § 1581(h) was intended to provide an importer with review of a ruling contained in a "ruling letter" issued to him [19 CFR § 177.9(b)] which can only be obtained prior to importation of goods. The provisions appear to be parallel. However, we do not need to rule on this issue but merely note that the importers failed to utilize this procedure which detracts from their argument of hardship.

The purported basis for invoking § 1581(h) put forth by the importers is that the revocation of TAA # 10 affects future imports they plan to make. A similar

argument was made and rejected in *Uniroyal,* where the court held, 687 F.2d at 472:

> In addition, to the extent that Uniroyal's prayer for relief is directed to future importations of uppers and soles, Uniroyal has not demonstrated the "irreparable harm" Congress has required before the trial court can exercise jurisdiction over an appeal of a ruling prior to the importation of goods and the filing and denial of a protest. [Footnote omitted.]

Here, as well, importers have not demonstrated irreparable harm with respect to future imports. The evidence of harm on which they rely is the financial burden of past transactions. No showing of harm has been made with respect to future imports. Moreover, the importers are aware that the increased duty must be taken into account in future dealings with customers.

As a final matter, a § 1581(h) case would not provide relief for past transactions which are the principal subject matter of this complaint. Declaratory relief only is available. 28 U.S.C. § 2643(c)(4).[5]

Thus, importers have wholly failed to meet the requirements of § 1581(h).

III

Finally, the importers claim that the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.,* (APA) gives the Court of International Trade "the right to fashion the appropriate remedy, without hindrance of the usual procedure, when there are Constitutional violations of the

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5. 28 U.S.C. 2643(c)(4) reads:

> In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

type and nature suffered by American Air." However, clear precedent exists that the APA is not a jurisdictional statute and does not confer jurisdiction on a court not already possessing it. *Califano v. Sanders*, 430 U.S. 99 (1977).

Thus, the APA does not give an independent basis for finding jurisdiction in the Court of International Trade. Rather, 28 U.S.C. § 1581 is the jurisdictional statute which governs this case. As the importers have failed to establish jurisdiction under 28 U.S.C. § 1581 for the reasons recited above, the decision of the Court of International Trade is *affirmed*.

AFFIRMED

No. 83-1178

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD. AND E.C. MCAFEE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of International Trade has jurisdiction under 28 U.S.C. (Supp. V) 1581(h) or (i) to entertain an action to enjoin the Customs Service from retroactively changing its method of assessing the value of certain dutiable goods.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A34) is reported at 718 F.2d 1546. The opinions of the Court of International Trade (Pet. App. A1-A20) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1983. The petition for a writ of certiorari was filed on January 12, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner American Air Parcel Forwarding Company (American Air), a freight consolidator, transports made-to-measure clothing produced in Hong Kong to this country and then has the apparel shipped to each ultimate purchaser (Pet. App. A22). Petitioner E.C. McAfee Co., a

customshouse broker, is the importer of record of the 12 import entries that are specifically listed as subjects of this suit (*ibid.*).

In early 1980, petitioner American Air queried the District Director of Customs in Detroit concerning the proper valuation for customs purposes of the apparel it was importing from Hong Kong, and it supplied to the Director what it deemed to be the pertinent information (Pet. App. A4). The District Director requested internal advice on this question from Customs Service headquarters pursuant to 19 C.F.R. 177.11 (Pet. App. A4). In the meantime, the 12 specified entries were made in Detroit for the account of American Air. American Air paid estimated duties based on what it considered to be the correct price, *i.e.*, the price paid to the tailors in Hong Kong (Pet. App. A3-A4). On October 17, 1980, the Customs Service ruled in favor of petitioners in a memorandum entitled "Export Value: Dutiability of Sales from Manufacturers to Distributors," C.S.D. 81-72 (TAA #10) (Pet. App. A3). The ruling stated that based on the information furnished by the importer, the Hong Kong sales price, as opposed to the price paid by consumers in the United States, was appropriate for assessing import value (*id.* at A3-A5). That ruling was affirmed in July 1981, pending further review of the underlying facts supplied by petitioners (*id.* at A4).

In August 1981, however, the Customs Office of Regulations and Rulings concluded that TAA #10 did not accurately reflect the realities of the made-to-measure industry (Pet. App. A4). That determination was incorporated in a telex order from Customs Service headquarters on September 9, 1981, directing field offices to require the assessment of import duties on the basis of the price paid by the United States consumer (*id.* at A5). Before implementing this order, the Customs Service did not notify the importers or provide interested parties with an opportunity to

comment on the proposed change (*id.* at 8). As a result of this interpretation, the 12 entries identified by petitioners were liquidated in November 1981 at values significantly in excess of the entered values (*id.* at A5-A6, A25).[1]

2. On February 1, 1982, petitioners filed a protest with the Customs Service. Three days later, without paying the assessed duties or waiting for a response from the Service, petitioners commenced the instant action in the Court of International Trade under 28 U.S.C. (Supp. V) 1581(h) and (i) (Pet. App. A25). Asserting that the Service was required to follow the publication and notice requirements set out in 19 U.S.C. 1315(d) and 19 C.F.R. 177.10(c) before revoking TAA #10,[2] petitioners sought a preliminary injunction restraining the Customs Service from implementing the new ruling. The court initially granted the preliminary injunction (Pet. App. A1-A11). However, following the decision in *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982), the court granted the government's motion to dismiss for lack of jurisdiction (Pet. App. A12-A20).

---

[1]After paying the estimated duties, American Air released the goods into commerce. Thus, American Air collected money from its customers based on the estimated duties before the Customs Service imposed the higher charge. Petitioner contends that, as a practical matter, it cannot recoup any of that money from its customers and that consequently it has suffered irreparable financial harm (see Pet. App. A5-A6, A8-A9).

[2]The Customs Service maintains that publication and notice are not required under the applicable statute and regulation until after a uniform practice has been established. TAA #10, as an internal advice memorandum, did not automatically create a uniform and established practice. See *Hensel, Bruckmann & Lorbacher, Inc.* v. *United States*, 44 Cust. Ct. 722 (1960), aff'd, 49 C.C.P.A. 15 (1962); *Ditbro Pearl Co.* v. *United States*, 515 F.2d 1157 (C.C.P.A. 1975).

The court of appeals affirmed (Pet. App. A21-A34). It held that jurisdiction did not exist under 28 U.S.C. (Supp. V) 1581(i),[3] the "residual" or "catch-all" jurisdictional provision for the Court of International Trade, because petitioners had by-passed the traditional method of obtaining review under 28 U.S.C. (Supp. V) 1581(a), *i.e.*, filing a protest and, if the protest is denied, paying the duty (Pet. App. A26-A30).[4] The court of appeals also held that jurisdiction was not available under 28 U.S.C. (Supp. V) 1581(h), which provides jurisdiction for certain declaratory judgment actions brought prior to importation of the goods at issue (Pet. App. A31-A33).

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[3]28 U.S.C. (Supp. V) 1581(i) provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[4]28 U.S.C. (Supp. V) 1581(a) provides that the "Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." In turn, 28 U.S.C. (Supp. V) 2637(a) provides: "A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges or exactions have been paid at the time the action is commenced * * *."

ARGUMENT

Petitioners erroneously contend (Pet. 16-19) that the Court of International Trade had jurisdiction to entertain their action under 28 U.S.C. (Supp. V) 1581(h) and (i).

1. In enacting Section 1581(i), Congresss clearly did not intend to abrogate its long-standing policy requiring importers who are dissatisfied with the customs duties levied upon their goods to pay the duties before invoking judicial review. As the court of appeals stated in *United States* v. *Uniroyal, Inc.*, 687 F.2d at 471, "the legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." The protest procedure ensures that funds are available to pay the duty, and it implements the congressional directive that the "importer should not be entitled to retain the use of additional duties determined to be due while court proceedings continue over possibly lengthy periods of time." *Dynasty Footwear* v. *United States*, 551 F. Supp. 1138, 1141 (Ct. Int'l Trade 1982) (quoting *Hearings on S. 2624 Before Subcomm. No 3 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 229 (1970)). The "residual jurisdiction" provision is therefore applicable only if the other provisions for administrative relief are not available.

Furthermore, petitioners have not offered any compelling reason for not paying the assessed duties prior to obtaining judicial review. In the first place, allegations of financial hardship have never sufficed to circumvent the prepayment requirement of Section 1581(a), which is an important part of the congressional scheme. *Jerlan Watch Co.* v. *United States Dep't of Commerce*, 597 F.2d 687, 691-692 (9th Cir. 1979); *Lowa, Ltd.* v. *United States*, 561

F. Supp. 441 (Ct. Int'l Trade 1983) (showing of financial need not sufficient to circumvent the Section 1581(a) requirement), aff'd, No. 83-1018 (Fed. Cir. Jan. 4, 1984). In addition, as the court of appeals noted (Pet. App. A29), petitioners could have avoided their present difficulties by obtaining pre-importation review of the valuation of the merchandise under 28 U.S.C. (Supp. V) 1581(h). Accordingly, "[t]heir plight cannot be attributed to deficiencies in the statute" (Pet. App. A29). Petitioners' suggestion (Pet. 24) that the Customs Service would have violated a declaratory judgment entered in such a suit is wholly unfounded.

Moreover, following the route specified in Section 1581(a) would not cause undue delay. Under 19 C.F.R. 174.22, litigants may request expedited disposition 90 days after filing a protest. If the Customs Service does not act upon that request within the ensuing 30 days, the litigant may immediately file for review in the Court of International Trade. Thus, contrary to petitioners' allegations, Section 1581(a) provides a prompt, efficacious remedy for the purported injury they suffered. Petitioners, however, chose to bypass that alternative and file directly in court.

Nor is there any merit to petitioners' suggestion (Pet. 11-12) that this case is analogous to *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). In that case, the Court permitted a Social Security disability claimant to litigate whether a pre-termination hearing was mandated by due process before exhausting the post-termination procedures established by the Secretary. That decision rested upon the determination that otherwise the claimant could not have obtained full relief. Here, as noted, petitioners could have obtained pre-importation review, as well as expeditious review under Section 1581(i) after pursuing the protest

procedure.[5] *Eldridge* does not support petitioners' claimed right to review at some intermediate point.

2. Petitioners' argument that jurisdiction exists under Section 1581(h) is likewise incorrect.

First, as the court of appeals correctly held (Pet. App. A32-A33), petitioners could not prove, as required by Section 1581(h), that they "would be irreparably harmed unless given an opportunity to obtain judicial review prior to * * * importation." An action under Section 1581(h) would not affect the duties on goods already imported. See Pet. App. A33 & n.5. And revocation of TAA # 10 will not cause petitioners irreparable harm with respect to goods imported in the future because petitioners can take the increased duties into account in billing customers.

Second, Section 1581(h) permits review of certain "ruling[s]" of the Secretary of the Treasury or his refusal to issue such rulings. That provision does not apply to a request for internal advice. As stated in the House Report (H.R. Rep. 96-1235, 96th Cong., 2d Sess. 46 (1980)), "[t]he word 'ruling' is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction. In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review', both of which relate to completed import transactions."

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[5]Petitioners have paid the duty for at least one entry and have filed a new action in the Court of International Trade. See *American Air Parcel Forwarding Co.* v. *United States*, No. 83-7-00995 (Ct. Int'l Trade Sept. 20, 1983) (permitting petitioners to maintain action after denial of protest and payment of the assessed duty on one of the specified entries). In addition, American Air's customers have also filed suits covering some of the entries specified in the instant action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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